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United States

Circuit Court of Appeals

For the Ninth Circuit.

GETZ BROS. & CO. OF THE ORIENT, LIMITED,

Plaintiff in Error,

vs.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE COMPANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Court for China.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	15
Assignment of Errors	61
Bill of Exceptions	11
Bond on Writ of Error.....	75
Certificate of Clerk U. S. Court for China to Transcript of Record	83
Certificate of Reporter	44
Citation on Writ of Error.....	81
Demurrer	10
Exception to Order Overruling Demurrer (April 20, 1923).....	14
Exception to Order Overruling Demurrer (April 21, 1923).....	17
Exception to Order Overruling Motion to Dis- miss Petition	57

EXHIBITS:

Plaintiff's Exhibit "A"—Letter Dated February 20, 1922, Getz Bros. & Com- pany of the Orient, Ltd. to F. J. Schuhl	40
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Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit "B"—Unsigned Letter Dated February 16, —2, to Getz Bros. & Company	40
Plaintiff's Exhibit "C"—Unsigned Letter Dated February 21, 1922, to Getz Bros. & Company of the Orient, Ltd.	41
Plaintiff's Exhibit "D"—Letter Dated February 14, 1922, Getz Bros. & Com- pany of the Orient, Ltd. to Merchan- dise Brokerage Company.....	42
Defendant's Exhibit No. 1—Check Dated February 14, 1922, Getz Bros. & Com- pany of the Orient, Ltd. to Merchan- dise Brokerage Company.....	43
Judgment	48
Notice of Appeal	58
Notice of Motion	59
Order Allowing and Settling Bill of Excep- tions	61
Order Allowing Writ of Error.....	73
Order Extending Time to August 31, 1923, to File Record and Docket Cause.....	81
Order Overruling Demurrer.....	12
Petition	1
Petition for Writ of Error.....	71
Praecipe for Transcript of Record.....	77
TESTIMONY ON BEHALF OF PLAIN- TIF:	
CHING, SUNG YU	29
Cross-examination	29

Index.	Page
TESTIMONY ON BEHALF OF PLAINTIFF—Continued:	
SHIREK, H. M.	18
Cross-examination	23
Redirect Examination	28
YUNG, ZEE CHANG	30
Cross-examination	31
TESTIMONY ON BEHALF OF DEFENDANT:	
ANGUS, P. Y.	32
Cross-examination	34
REEVES, C.	36
Writ of Error.....	79

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO., OF THE ORIENT, LTD.,
Defendant.

Petition.

Plaintiff complains of defendant and for cause of action alleges:

1. That the plaintiff is a brokerage company duly registered at the American Consulate in Shanghai, and the defendant is an American Corporation doing business in the City of Shanghai, Republic of China.

2. That on or about the 3d day of February, 1922, defendant made and entered into a written contract with plaintiff, for the sale of 370 tons of Mild Steel Plate Cuttings, a copy of said contract is hereto attached and made a part hereof.

3. That plaintiff has duly performed all the conditions on his part to be performed and on the 3d day of February and ever since was ready and willing to receive and pay for, and duly offered to defendant to receive and pay for said Steel Plate Cuttings mentioned in said agreement.

4. Defendant did not then, or at any time, deliver said merchandise to plaintiff.

5. That said plaintiff because of said failure to deliver has been damaged in the sum of Taels 6.350.48.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Taels 6.350.48 interest and costs of suit.

Shanghai, March 27th, 1922.

F. J. SCHUHL,
Attorney for Plaintiff.

Filed at Shanghai, March 28, 1922. W. A. Chapman, Clerk. [1*]

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

H. M. Shirek, being duly sworn, deposes and says that he is the general manager and sole proprietor of the Merchandise Brokerage Company, the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters therein stated on information and belief, and as to those matters he believes it to be true.

H. M. SHIREK.

Subscribed and sworn to before me this 28th day of March, 1922.

W. A. CHAPMAN,
Clerk of the United States Court for China. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

CONTRACT.

GETZ BROS. & CO., OF THE ORIENT LTD.

Shanghai, February 3d, 1922.

Getz Bros. & Co., of the Orient Ltd., have sold and Merchandise Brokerage have bought the following-described merchandise, upon the terms and conditions as named herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable.

Seller is not responsible for nondelivery by reason of loss of cargo en route, fire or any unavoidable casualties, or for delays beyond their control.

To be insured against war risk at buyer's expense.

TERMS—

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922.

Quantity	Description	Price U. S. Gold
370	Tons (More or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.	

Say Three hundred sixty to Three hundred seventy-one tons at Shanghai Taels 2.75 per picul of 133 $\frac{1}{3}$.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if

Quantity	Description	Price U. S. Gold
	cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.	

Approved by seller,

GETZ BROS. & CO., OF THE ORIENT LTD.

(Signed) By T. L. PARKHURST,

Manager.

CONDITIONS.

If, after having been notified by the sellers of their readiness to deliver the goods, the buyers fail to take delivery of, and pay for, the same in accordance with this contract, they shall pay to the sellers, monthly thereafter, interest at the rate of 12% per annum on the contract price. The sellers shall nevertheless be at liberty in such an event, to require the buyers either to take immediate delivery of and to pay for the goods, or from time to time, to pay to the sellers a sum of money on account of the contract price in addition to the said interest at the rate of 12% thereon or on so much thereof as shall have been unpaid; and in the event of the buyers failing to comply with such requirements or of their failing to pay to the sellers any sum payable by them under this clause, the sellers may forthwith resell the goods either by public auction or private contract, and the buyers shall thereupon pay and make good to the sellers all loss (being the difference between the amount re-

alized from the sale of the goods and the contract price, with the said additional sum of 12% per annum on the contract price, or on so much thereof as shall have been unpaid) and all expenses thereby incurred by the sellers.

Sellers guarantee to insure the goods covered by this contract against loss by fire while remaining in the godowns of the steamship company bringing the cargo to Shanghai, for a period of not more than ten days after arrival. Insurance after that period is to be borne by buyers, and in event of loss by fire, buyers shall pay to the sellers the invoice value of said cargo together with such other expenses as may have been incurred by sellers for account of buyers in importation of said cargo.

The sellers may, if they consider it necessary or advisable to do so, insure against war risk for account of the buyers, but shall not be obliged to do so.

All duties and importing charges incurred by sellers in making importation into Shanghai shall be for account of buyers.

The sellers shall not be liable for delay in shipment of the goods or any portion of the goods, the subject of this contract, or for the nonfulfillment by them of this contract, or any portion thereof, in consequence of war, strikes, lock-outs, fire, flood, drought, accident, or any happening beyond the sellers control, nor in consequence of the anticipation by themselves or by others of any such event, whereby the manufacture, supply, shipment, transit or delivery of the goods or any portion thereof is prevented or delayed.

The sellers will not be responsible for loss or non-delivery due to commandeering of Cargo, Railways, Steamships, or withdrawal of same, or any other cause due to conditions of war. Commandeering of cargo by United States Government, or the taking over of a large portion of the output of a mill, cancels that portion of the contract on which material was commandeered by the Government or material unshipped from mill at time of Government interference.

All charges incurred for storing, interest, fire insurance, cartage, retrans-shipment, caused by Government embargo commandeering of railways or steamships, for the buyer's account.

The shipment shown on this contract is given only as an indication of the approximate that shipment is expected to move from factory and sellers assume no liability whatever for mill delays, or delays occasioned by shortage of steamship space, cancellation of steamer sailings, or any causes beyond their control.

Sellers reserve the right to make shipment either via Pacific Coast or Atlantic Coast at their option.

In the event of goods, or any portion thereof being lost in transit, or destroyed, before delivery, this contract shall be void, except as regards that portion of the goods (if any) which shall not have been destroyed.

The sellers will not be responsible for losses due to damage, leakage, evaporation or improper deliveries on part of wharf companies while goods are stored at wharf or in private godowns.

The buyers shall not be entitled to repudiate this contract, nor to claim compensation from the sellers, upon the ground that the goods have become rusted or damaged in transit, or have deteriorated in consequence of natural causes.

All shades of color, descriptions, dimensions, packing, quality, quantity, etc., are guaranteed approximately correct only, and usual trade margins of the country of production are allowed with regard to same.

In the event of there being more than one contract, for the purchase and sale of goods existing between the buyers and seller and in the event of buyers failing to carry out any of the terms of the contract, the sellers shall be entitled to refuse delivery to the buyers of any goods, or any portion [3] thereof, the subject of any other contract, until the buyers have complied with the terms of this contract.

No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai, nor shall any such claim be made after delivery has been taken, and the goods have been removed from the place of delivery, by the buyers.

The certificate of Lloyds, or of other competent examiners appointed for the purpose, as to the quality, quantity, description, dimension, shade of color, or otherwise, of the goods shall be final and conclusive as to all matters dealt with by such certificate.

Any tests with which it may be required that the goods must conform shall be made at the works of the manufacturers of such goods prior to the shipment thereof, and at no other place or time; and tests so made shall be final and binding on both parties to this contract.

Each partner in the Nong constituting the firm of the buyers shall be liable to the sellers for the due performance of this contract and every part thereof, as if such partner were the sole buyer and the sole proprietor of the business of such Hong.

Should any dispute arise between the buyers and sellers as to the quality or condition of the goods or otherwise in relation to this contract, which they are themselves unable to settle, the same shall be referred to the arbitration of three persons, two to be nominated by the American Consul-General of Shanghai and the third to be appointed by the two so nominated and the decision of any two of the arbitrators shall be binding both as regards the matter submitted to arbitration and so decided, and as regards the costs of arbitration.

CIF, CIF & C, and CIF C & I Contracts differ from FOB Contracts only in that Getz Bros. & Co. of the Orient Ltd. guarantee the cost of Insurance, Freight, or Insurance, Freight and Commission, or Insurance, Freight, Commission and Interest, as may be stipulated in the terms of purchase. No additional responsibility on Getz Bros. & Co. of the Orient Ltd. is involved.

C.I.F. Price includes manufacturers cost through

freight from factory to point of destination and marine insurance as stipulated in contract.

If the goods (or any part thereof) are not shipped from the United States within the time stipulated in this contract in consequence of *force majeure*, or any other causes beyond the control of the sellers, the buyers shall not be entitled to rescind this contract, nor to claim damages for breach thereof, but must take delivery when cargo arrives in Shanghai, irrespective of the period of delay.

In the event of the goods, or any portion thereof, ordered under this contract, being delayed in shipment by reason of embargoes imposed by the Government of United States of America, or owing to any other causes beyond the sellers' control, due to United States of America being in a state of war, the sellers shall not be liable for delay in delivery. Should such embargo be subsequently removed and the said goods or any portion thereof subsequently arrive the buyers shall be bound to accept under the terms of this contract, the said goods or such portion or portions thereof as shall so arrive.

It is further understood and agreed that if any one order placed by buyer with the seller is not delivered owing to causes beyond sellers' control, the buyer hereby agrees that such nondelivery is not to nullify his contracts with the seller for other materials nor is such nondelivery to be accepted by buyer as a justification or reason for attempting cancellation of such other contracts.

It is also understood that the sellers' obligation to fulfill the terms of this contract is subject to the United States Government issuing an Export License covering material specified in this contract.

Force majeure to free Getz Bros. & Co. of the Orient Ltd. from all responsibility in connection with this contract. [4]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Demurrer.

Now comes the above-named defendant, through its attorneys, Fleming, Davies & Bryan, and demurs to plaintiff's petition filed herein, on the ground that said petition does not state facts sufficient to constitute a cause of action.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Demurrer. Filed at Shanghai, April 10, 1922.
(Sgd.) W. A. Chapman, Clerk. [5]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Bill of Exceptions. Filed at Shanghai, China,
this 7th day of July, 1923. —————, Clerk.

Bill of Exceptions.

BE IT REMEMBERED that on the 16th day of April, 1923, the above-entitled action came on for hearing upon plaintiff's petition and defendant's demurrer to plaintiff's petition before the Honorable Charles S. Lobingier, Judge of the United States Court for China, the plaintiff appearing by Messrs. Schuhl & Schoenfeld in the person of F. J. Schuhl, Esq., and the defendant appearing by Messrs. Davies & Bryan in the person of J. B. Davies, Esq., and the following proceedings took place.

Thereafter on the 19th day of April, 1923, the Honorable Charles S. Lobingier, Judge of the United States Court for China, filed with the Clerk of said Court an order overruling defendant's demurrer. Said order is as follows: [6]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Order Overruling Demurrer.

SYLLABUS.

(By the COURT.)

1. SALES.—Conditions.—A sale of merchandise with an undertaking for “complete delivery” by a certain date “from Shanghai stock” is not rendered conditional by a further clause requiring delivery of shipping documents “on payment, if cable advice from home office permits.”

2. ID.—ID.—Haieh Po-Hsiang vs. Shippers' Commercial Corp., I Extrater., 1010, distinguished. Messrs. DAVIES & BRYAN, by Mr. Davies, for demurrant.

Messrs. SCHUHL & SCHOENFELD, by Mr. Schuhl, *contra*.

LOBINGIER, J.—Defendant demurs to a complaint alleging nonperformance of a contract whose material provisions follow:

“GETZ BROS. & CO., OF THE ORIENT, LTD., *have sold* and Merchandise Brokerage *have bought* the following-described merchandise, upon the terms and conditions as named

herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable. * * *

Shipment: Delivery from Shanghai Stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1923. * * *

Receipt of deposit Tails 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be received approximately seven (7) days when written confirmation will be made."

It is the last paragraph which affords the basis of the demurrer, defendant's counsel contending that it brings the case within one¹ where sale was "subject to * * acceptance at Seattle office." But this contract, it will be seen, does not contain that provision. It is true that defendant agrees "to deliver documents on payment, if cable advice from home office permits," etc. But the documents (which appear to mean shipping papers) do not seem important in this transaction. "Delivery" is to be made "from Shanghai stock," so that shipping documents would seem unnecessary. At any rate it is not the documents but the goods which are the subject matter of the sale and of the latter "complete delivery and full payment" were "to be

¹ *Haieh Po-Hsiang vs. Shippers' Commercial Corp., 1 Extrater., 1010.* [8]

made on or before February 28, 1922.” This undertaking was not “subject to acceptance by the home office” and the fact that another, and minor, feature may have been, would not prevent enforcement of the former.

The complaint, having alleged performance on plaintiff’s part and nondelivery, seems, therefore, to state a cause of action and the demurrer is, accordingly, overruled. Defendant is allowed ten days to answer.

By the Court,

CHARLES S. LOBINGIER,

Judge.

Order. Filed April 19, 1923. W. A. Chapman,
Clerk. [7]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Exception to Order Overruling Demurrer.

Now comes the above-named defendant, through Davies & Bryan, its counsel, and excepts to the

order of this Court made on April 19, 1923, overruling demurrer to plaintiff's petition filed by it.

Dated Shanghai, April 20, 1923.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

Exception. Filed at Shanghai, China, this 21st day of April, 1923. W. A. Chapman, Clerk. [9]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Answer.

Copy to Schuhl & Schoenfeld, April 26, 1923.

Now comes the above-named defendant and answering plaintiff's petition filed herein shows unto this Honorable Court as follows:

1. Answering paragraph one of said petition defendant admits that it is an American Corporation carrying on business at Shanghai, China, but has no knowledge as to the other matters therein alleged, and therefore denies the same.

2. Answering paragraph two of said petition, defendant admits executing the document therein mentioned, a copy of which is attached to said petition, but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant's home office as provided for in said document.

3. Answering paragraph three of said petition, defendant has no knowledge of the matters therein alleged, and therefore denies the same.

4. Defendant admits paragraph four of said petition.

5. Defendant denies each and every allegation contained in paragraph five of said petition.

6. Further answering said petition, and by way of a further and separate defense, defendant alleges that if any contract existed between the parties hereto, as alleged by plaintiff [10] in this petition, that the same has been canceled by mutual consent of the parties hereto.

WHEREFORE, defendant prays this Honorable Court for an order dismissing plaintiff's said petition, without cost to the defendant.

GETZ BROS. & CO. OF THE ORIENT, LTD.

(Sgd.) By T. L. PARKHURST,

Manager.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

T. L. PARKHURST, being duly sworn, deposes and says that he is the general manager in Shang-

hai of the above-named defendant, and signed the above answer as such; that he has read said answer, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Sgd.) T. L. PARKHURST.

Subscribed and sworn to before me this 26th day of April, 1923.

(Sgd.) R. T. PEYTON-GRIFFIN,

Deputy Clerk United States Court for China.

Answer. Filed at Shanghai, China, this 26th day of April, 1923. (Sgd.) R. T. Peyton Griffin, Deputy Clerk. [11]

Exception to Order Overruling Demurrer.

Thereafter on the 21st day of April, 1923, the defendant through its attorneys, Messrs. Davies & Bryan, filed with the Clerk of said court a formal written exception excepting to the said order overruling defendant's demurrer, which said defendant hereby designates as its

EXCEPTION No. 1.

That thereafter on Tuesday, the 12th of June, 1923, the above-entitled action came on regularly for trial before the Honorable Charles S. Lobingier, Judge of the United States Court for China, the plaintiff appearing by Messrs. Schuhl & Schoenfeld in the person of F. J. Schuhl, Esq., and the defendant appearing by Messrs. Davies & Bryan in the person

of R. T. Bryan, Jr., Esq. Thereupon the following witnesses were called and examined after being duly sworn: [12]

Testimony of H. M. Shirek, in His Own Behalf.

Witness—H. M. SHIREK.

(Questions by Mr. F. J. SCHUHL.)

Q. State your name please?

A. Henry Shirek.

Q. What connection have you with the Merchandise Brokerage Co.? A. Sole proprietor.

Q. Where are your offices located?

A. No. 9 Extra Road.

Q. How long have you resided in Shanghai?

A. 3½ years.

Q. What is your nationality? A. American.

Q. Did you ever have any transaction with the defendant company?

A. I entered into a contract with them for the purchase of plate cuttings.

Q. That is the contract attached to the petition.

A. Yes.

A. I will ask you if you deposited Tls. 900 as bargain money under that contract? A. I did.

Q. And whether or not this cargo as stated in the contract was delivered to you? A. No.

Q. Was the Tls. 900 returned to you? A. Yes.

Q. When was it returned?

A. On or about February 14, 1922.

Q. What did you do when you received the check?

A. I kept it on hand for several months.

(Testimony of H. M. Shirek.)

Q. Did you have any conversation with Mr. Parkhurst with reference to this, with reference to delivery? [13] A. Yes.

Q. When was the first discussion, what date?

A. It was about the 12th or 13th.

Q. Of February? A. Yes, 1922.

Q. What was stated by him on that date?

A. Mr. Parkhurst stated he had received a cable from his home office which advised him to proceed legally against the original purchasers of the cargo.

Q. Did he proceed legally against the original purchasers of the cargo? A. He did not.

Q. Was the cargo eventually sold to the original purchasers?

A. No, he sold it to a different party.

Q. Tell the Court the conversation you had with Mr. Parkhurst before signing the contract?

Objection: conversation leading up to the contract was not admissible: the contract speaks for itself.

Mr. SCHUHL.—It is necessary to explain an ambiguity.

The COURT.—What do you want to prove?

Mr. SCHUHL.—The conversation was this. If the home office advised Mr. Parkhurst that he would have to sue the original purchasers of the cargo, Mr. Shirek would not be able to have the cargo.

Q. Did he show you the cable?

A. No, he would not. He was not willing to do so.

(Testimony of H. M. Shirek.)

Q. Who eventually got this cargo? Do you know?

Objection: nothing to do with this case. Immaterial, incompetent and irrelevant.

The COURT.—What is the purpose of the question?

Mr. SCHUHL.—To show the original buyers did not get the cargo.

The COURT.—It might be material who the original buyers were.

Q. Who were the original buyers?

A. There were several in number. I could not remember who the original buyers were, all of them. There were possibly five or six. [14]

Q. Do you know whether they received the cargo?

A. The original purchasers?

Q. Yes?

A. No, they refused to take delivery on the plea that the cargo was not up to specifications, or something rather wrong with it.

Q. The original buyers refused to take delivery?

A. They did.

Q. Later on, after this contract was signed, on or about February 20, did you receive a letter through me from Messrs. Getz Bros. offering delivery of part of the cargo? A. Yes, I recall.

Q. I will show you Plaintiff's Exhibit "A" and ask you if that is the letter you received from me?

A. Yes.

Plaintiff's Exhibit "A" offered in evidence.

Objection: Irrelevant, immaterial and incompe-

(Testimony of H. M. Shirek.)

tent, tending to prove nothing in the case. The letter on the face of it appears to be another offer for the sale of fifty tons of plate cutting.

Mr. SCHUHL.—Plaintiff's Exhibit "B" is a letter which I wrote to Getz Bros. on February 16, which is admitted by Mr. Bryan, and Exhibit "A" is a letter in reply.

Plaintiff's Exhibit "B" offered in evidence.

Objection: irrelevant, immaterial and incompetent and tending to prove or disprove no issues in the case.

The COURT.—I think the whole correspondence might enlighten the Court on the situation. This seems to refer to another letter on the 14th. Have you got that?

Mr. SCHUHL.—Yes.

The COURT.—I think the whole correspondence would be helpful.

Q. The cargo mentioned in Exhibit "A" of which they state they are holding fifty tons which they would allow you to take up. Is that part of the original cargo? A. Yes.

Q. Part of the cargo mentioned in the contract? A. Yes.

Q. You are positive of that? A. Yes. [15]
Exhibit "C" offered in evidence.

Q. The price that you were to pay for the cargo was Tls. 2.75 per picul? A. Yes.

Q. Do you know what the market price was about February 28, 1922?

(Testimony of H. M. Shirek.)

A. It was approximately Tls. 1.00 higher than the price at which I purchased it under the contract.

Q. It had advanced one tael? A. Yes.

Motion to strike out all Exhibits offered in evidence unless plaintiff offered the letter of February 14.

Mr. SCHUHL.—I am going to do that.

The COURT.—Why not do it now?

Mr. SCHUHL.—I will.

Q. Showing you Exhibit “D” I will ask you whether you received that letter? A. Yes.

Q. What did you do upon receipt of that letter?

A. I objected to it.

Q. In what form?

A. Verbally, and I made enquiries.

Q. Did you talk with Mr. Parkhurst about it?

A. Yes.

Q. What did you tell him?

A. I asked to be shown the cable which said, if they received it, they were to pursue legal proceedings against the original purchasers.

Q. Did they show you the cable? A. No.

Q. They did not take legal proceedings?

A. They did not.

Q. What loss did you suffer through the failure of the defendants to live up to the contract? [16]

A. Tls. 6,000.00.

Q. How did you suffer such a loss?

A. The purchase price under the contract was Tls. 2.75 per picul. There was approximately six thousand piculs and the market price was approxi-

(Testimony of H. M. Shirek.)

mately Tls. 1.00 higher and I could have sold for Tls. 3.75.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. The last clause on the first page of the contract says "Reply should be received approximately seven days when written confirmation will be made." Was any written confirmation ever made?

A. In what form?

Q. Was any written confirmation ever made to that contract?

A. No written confirmation. The only written reply, I might say, to that contract, was written on February 14.

Q. No written confirmation was made and the first reply you received was on February 14, which repudiated the contract?

A. Well it did, but it did not follow the terms of the contract.

Q. It repudiated the contract, did it not?

A. I don't believe so.

Q. You don't believe so? A. No.

Q. It did not confirm it?

A. On the face of it it would appear to repudiate the contract.

Q. It did repudiate it?

A. Well, not so far as I was concerned.

Q. As far as the defendants were concerned it repudiated the contract in the letter of February 14. Isn't that true?

(Testimony of H. M. Shirek.)

A. It was their desire to repudiate the contract, perhaps.

Q. And they informed you in this letter they had received a reply from their home office, February 7?

A. You have admitted the letter of February 7.
[17]

Q. In that letter was the check for Tls. 900?

A. Yes.

Q. Deposit money under the contract?

A. Deposit money I had put up.

Q. And you received it back? A. I did.

Q. Handing you Defendant's Exhibit 1, is this the check which you received from the defendants?

A. I believe so.

Q. And it is endorsed on the back by you?

A. Yes.

Q. And it is marked "cancelled" showing you received the money? A. Yes.

Defendant's Exhibit 1 offered in evidence.

Received without objection.

Q. Did you know these goods were in Shanghai?

A. The goods named in the contract?

Q. Yes. A. Yes.

Q. How did you know it?

A. I had inspected them.

Q. Did you make a claim within seven days after signing this contract?

A. I don't know I would consider it a claim. I put the matter in the hands of Mr. Schuhl as soon

(Testimony of H. M. Shirek.)

as I found Getz Bros. had not proceeded legally and would not deliver the cargo to me.

Q. Had not proceeded legally in your opinion?

A. That is a question—

Q. You made no claim before February 20. Isn't that so?

A. The goods were not en route from the United States or Europe. It was stock cargo.

Q. You made no claim before February 20? Answer my question, please? [18]

A. What form of claim?

Q. In writing. Did you or did you not make any claim on defendants before February 20?

A. There was no claim to be made.

Q. Did you, or did you not make any claim?

A. No.

Q. At the time you signed the contract on February 7, you knew the goods had arrived in Shanghai?

A. The cargo was already in Shanghai prior to that date.

Q. You knew it was in Shanghai at the time the contract was signed? A. Yes.

Q. You are quite sure, are you, that the defendants did not confirm this contract in writing? You are quite sure about that?

A. The only letter I received from them—the first letter—was dated February 14.

Q. They do not confirm the contract?

A. In that letter?

Q. In that letter.

(Testimony of H. M. Shirek.)

A. Well, I think they do not in that letter.

Q. Nor in any subsequent letter?

A. Well, there was the letter following that letter of February 14 which offered me fifty tons, whether that can be construed as such.

Q. That does not confirm your contract for 375 tons? A. No.

Q. There was no letter which confirmed the contract was there?

A. No, there was no letter which confirmed the contract.

Q. Were these plate cuttings cut up in strips or were they in big pieces?

A. Irregular sizes.

Q. Not cut up in strips?

A. Some were triangular pieces. [19] Some were strips, some were shearings and some were irregular sizes.

Q. You know it is customary for local dealers to cut them up into long strips, eighteen inches long, four to six inches wide, and to tie them up in bundles. You know that?

A. Do I know whether that is customary?

Q. Yes?

A. It just depends upon the purpose to which they put them.

Q. Plate cuttings in strips and bundles are more expensive than those which come in irregular shapes and sizes?

A. They were not tied up in bundles, some were shearings and some triangular pieces.

(Testimony of H. M. Shirek.)

Q. Will you answer my question?

A. They are more expensive?

Q. Yes? A. I don't know.

Q. You don't know whether they are or are not?

A. No.

Q. And yet you have testified as to market conditions?

A. I know this, that regular shapes in plate cuttings are a whole lot more valuable, whether they are tied up in bundles or how they are packed does not make much difference. Maybe they would be a little more convenient to handle.

Q. Do you know that plate cuttings in February could be purchased from abroad from Tls. 2.20 to Tls. 2.60 per picul?

A. Well, there are different kinds of plate cuttings. I don't recall what the indent price for plate cuttings was just about that time.

Q. You don't know the indent price at that time?

A. I don't recall.

Q. Then how can you recollect the market price?

A. Because that had a direct bearing upon my profit and loss. [20]

Q. The only thing you lost was the difference between the contract price and the market price?

A. What I lost was the difference between the contract price and what I could have sold it for.

Q. You did not lose your deposit?

A. I received that back.

(Testimony of H. M. Shirek.)

Redirect.

(Questions by Mr. SCHUHL.)

Q. The first letter you received from Getz. Bros. was much more than seven days after the signing of the contract? A. It was dated February 14.

Q. Had you any conversation with Mr. Parkhurst before the fourteenth?

A. Yes, I think about the 12th or 13th.

Q. Relate the conversation?

A. It was with respect to whether they could carry out the contract or not and Mr. Parkhurst said he had already received a cable from the office in San Francisco and they advised they should proceed legally against the original purchasers.

Q. Did he say he was going to proceed legally?

A. Yes.

Q. Had you any conversation before that with him?

A. Well, if I recollect properly I think I telephoned to him on or about the time the contract was to be confirmed to find out whether he had received any advice. At that time I don't believe he had received advice from his home office—not until a later date.

Q. Did you make any inquiries as to the market price?

A. After February 3, yes. I followed the market quite closely and there was a tendency towards an increase. The price was steadily advancing. I should not say "steadily" but fluctuating to a higher level. [21]

Testimony of Sung Yu Ching, for Plaintiff.

Witness SUNG YU CHING.

(Questions by Mr. SCHUHL.)

Q. State your full name? A. Sung Yu Ching.

Q. Age is what? A. 53.

Q. What is your occupation?

A. Iron merchant.

Q. Are you connected with the Chinese iron guild? A. Yes.

Q. What is your connection with that guild?

A. Chairman.

Q. What is the guild composed of?

A. Every month they are combined and talk over the market prices, some months every week.

Q. How long have you been chairman of the guild? A. Over ten years.

Q. Ask him if he knows whether during the month of February the market was steady or moving up or down in price on steel plate cuttings.

A. On February to March the price was Tls. 3.70 to Tls. 3.80 per picul.

Q. What day in February was the market price Tls. 3.70 to Tls. 3.80.

A. About February 15.

Q. What was it the last day of February, Number 28 day? A. About the same.

Q. About the same price? A. Yes.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. What was the price in February, did you say?

(Testimony of Sung Yu Ching.)

A. Tls. 3.70 to Tls. 3.80.

Q. What was the price in February in the beginning—how much? A. Same, same. [22]

Q. What class of plate cuttings?

A. (Answer not interpreted.)

Testimony of Zee Chang Yung, for Plaintiff.

Witness ZEE CHANG YUNG.

(Questions by Mr. SCHUHL.)

Q. State your name? A. Zee Chang Yung.

Q. How long have you lived in Shanghai?

A. 25 years.

Q. What is your occupation, what business are you in? A. Iron merchant.

Q. Are you connected in any way with the iron merchant's guild?

A. I am a member of the iron merchant's guild.

Q. How long have you been in the iron business in Shanghai?

A. Since I came out for business up to to-day.

Q. How many years? A. Twenty-five years.

Q. Are you acquainted with the market prices of mild steel plate cuttings? A. On what date?

Q. Between February 3 and 28, 1922?

A. At that time you can sell at Tls. 3.75.

Objection to interpretation by Mr. Bryan.

Mr. BRYAN.—Q. Ask him what the market price was in February, 1922? A. Tls. 3.75.

Mr. SCHUHL.—Q. The last day of February, what was the market price? A. Nearly that.

(Testimony of Zee Chang Yung.)

Cross-examination.

(Questions by Mr. BRYAN.)

Q. A little while ago you said the price was Tls. 3.00 to Tls. 3.08, didn't you?

A. I said three seven or three eight.

Q. Ask him if he said Tls. 3.00 or Tls. 3.08?

A. No. [23]

Q. When you said Tls. 3.07 or Tls. 3.08 you meant mace, didn't you?

A. I meant Tls. 3.70 to Tls. 3.80, not Tls. 3.07 to Tls. 3.08.

Objection. (Mr. BRYAN.) I would like to put it on record that I don't agree with the interpretation of the interpreter.

Offer by Mr. Schuhl to get another interpreter.

Mr. BRYAN.—I don't think it is material, if the Court pleases.

The COURT.—Very well, let that appear on the record, too.

Plaintiff rests.

Motion by defendant for judgment of nonsuit. (Typewritten motion handed in.)

The COURT.—Ruling on motion reserved.

Mr. BRYAN.—Exception reserved in case motion is overruled (which said defendant hereby designates as its exception No. 2).

Testimony of P. Y. Angus, for Defendant.

Witness P. Y. ANGUS.

(Questions by Mr. BRYAN.)

Q. State your name please?

A. Percy Yoshida Angus.

Q. Nationality?

A. British.

Q. How old are you?

A. 42.

Q. Married or single?

A. Married.

Q. What is your occupation?

A. Marine and cargo surveyor.

Q. How long have you been a marine and cargo surveyor?

A. About seven years.

Q. Will you please state your qualifications as marine and cargo surveyor?

A. Twenty-two years of sea experience, on ships, and two years apprenticeship as surveyor, several years experience with another local firm and for the last three years principal of my own firm.

Q. Are you familiar with the market price of plate cuttings in Shanghai? [24]

A. To some extent.

Q. To what extent?

A. Great quantities of this class of cargo go through my hands in the course of a year, various shipments, and we keep in touch with the market and we have facilities of being able to ascertain market values.

(Testimony of P. Y. Angus.)

Q. Do you know what the price of mild steel cuttings were in the month of February, 1922?

A. About the middle of the month, from records on the market, they ranged about Tls. 2.20 to Tls. 2.30. That was on order cargo. That was what cargo could be ordered for. That was on the American and European markets for mild steel cuttings.

Q. What was the market price for mild steel plate cuttings in Shanghai in February, 1922?

A. About Tls. 3.00 to Tls. 3.10.

Q. What part of the month?

A. About the middle of the month.

Q. About what was the price of mild steel plate cuttings about the 28th of February?

A. There was practically no alteration during the month, with a slight downward tendency in March.

Q. Did the market price rise between February 3d and the middle of the month?

A. Not in general. It may in certain contracts, but in general on the market it did not.

Q. These mild steel plate cuttings. What was the class of plate cuttings—first class, second class or third class?

A. Mild steel plate cuttings don't go in classes as a general rule but as shearings or cuttings from plates, irregular shapes, pieces which come from plates used in shipbuilding, or bridge build-

(Testimony of P. Y. Angus.)

ing, irregular pieces—triangular or rectangular pieces which are cut off. [25]

Q. Is it not a fact that Chinese cut these mild steel plate cuttings into strips about eighteen inches long—four to six inches wide and tie them up in bundles?

A. That is done.

Q. About what does it cost a picul to cut them in strips and put in bundles?

A. I am afraid I could not give you that answer. The cost for cutting just depends. Some of the local iron merchants have their own cutting machines, others cut by hand.

Q. Would you or would you not say that twenty tael cents per picul would be a fair estimate of what it would cost to cut.

Objection: leading question. Sustained.

Cross-examination.

(Questions by Mr. SCHUHL.)

Q. The twenty-two years of sea experience would not give you much knowledge of the price of mild steel cuttings?

A. The question I was asked was what led up to my being a surveyor.

Q. During the twenty-two years of sea experience you did not have much occasion to survey or note the price of mild steel plate cuttings?

A. That was leading up to my becoming a surveyor.

Q. During the month of February, 1922, how

(Testimony of P. Y. Angus.)

many surveys did you make of mild steel plate cuttings?

A. That I could not tell you.

Q. Did you make any?

A. I could not say.

Q. How are you able to fix in your mind what the market price was?

A. By enquiries upon the market.

Q. When did you make these enquiries? [26]

A. Yesterday.

Q. You made them yesterday?

A. Yes.

Q. Where did you make them?

A. On the market.

Q. What market?

A. The local market.

Q. Where?

A. From various importers.

Q. What importers did you enquire from?

A. People that it would be part of my business to know.

Q. What are the names of some of these importers from whom you enquired the price of these steel cuttings?

A. Must that question be answered?

The COURT.—I think so. You base your testimony on enquiries made from firms doing this kind of business. You asked them how much it was worth in February?

A. Yes. I have certain people whom I can ask from.

(Testimony of P. Y. Angus.)

Q. You are reporting what they told you as to the price in February?

A. Yes.

Application: The witness' evidence be stricken out on the ground that it is hearsay.

The COURT.—I am inclined to think the objection is good if the witness has no personal knowledge and is relying upon statements made by dealers. The way to prove this would be to call the dealers.

WITNESS.—I have my own records and I checked them up with various dealers.

Mr. SCHUHL.—Well, give us their names?

A. Messrs. P. Heath & Co. was one.

Q. They told you what the market price was in February?

A. Yes.

Mr. SCHUHL.—Objection: Application to strike out testimony on the ground of hearsay.

The COURT.—Sustained. To which ruling of the Court the defendant then and there excepted as follows:

Mr. BRYAN.—Exception reserved; which said defendant hereby designates as its

EXCEPTION No. 3.

Testimony of C. Reeves, for Defendant.

Witness C. REEVES:

(Questions by Mr. BRYAN.)

Q. What is your name? [27]

A. Christopher Reeves.

(Testimony of C. Reeves.)

Q. Nationality?

A. British.

Q. How old are you?

A. 40.

Q. Where do you live?

A. Shanghai.

Q. What is your business?

A. Marine and cargo surveyor.

Q. How long have you been a marine and cargo surveyor?

A. About nine years.

Q. Please state your qualifications as marine and cargo surveyor.

A. British Board of Trade extra master's certificate and nine years' experience, which is the most important thing.

Q. Are you familiar with the local market for mild steel plate cuttings?

A. Yes.

Q. Upon what do you base your familiarity with the market?

A. Surveying hundreds of tons of it as it comes in, under disputes or not under disputes as the case may be.

Q. Do you know what the market price was in February, 1922?

A. I would have to go to—

The COURT.—The question is “Do you know?”

A. Not personally.

Mr. BRYAN.—Q. What do you mean “Not personally”?

(Testimony of C. Reeves.)

A. I do not buy or sell cuttings. As a cargo surveyor I very very often find it necessary to put into my reports for underwriters actual market values. To find them it is necessary for me to call upon firms of repute, well known firms. That is how I acquire my knowledge.

Q. You call upon people and ask what the value of the cargo would be? [28]

A. I call upon reputable people and they, if I may say so, give me much more valuable information than anybody else, because it is to be personally and I do not divulge who gives it to me.

Q. You do not go beyond that?

A. I never deal in it myself.

Q. Did you in February, 1922, at any time during the month make any enquiries as to the market price?

A. I don't remember, that is a year and a half ago.

Q. What was the market price of mild steel plate cuttings from enquiries which you made yesterday?

Mr. SCHUHL.—Objection: Hearsay.

The COURT.—Sustained. To which ruling of the Court the defendant then and there excepted as follows:

Mr. BRYAN.—Exception reserved; which said defendant hereby designates as its

EXCEPTION No. 4.

Mr. BRYAN.—At this time, your Honor, I wish to renew my motion to dismiss the plaintiff's

petition, which I made at the conclusion of the plaintiff's case.

The COURT.—It is not necessary to renew it, for it has not yet been ruled upon.

Mr. BRYAN.—Then I wish to move at this time that the Court excludes from its consideration all the evidence introduced by plaintiff and give judgment for the defendant notwithstanding the evidence. [29]

COPY.

Head office

San Francisco, U. S. A.

Plaintiff's Exhibit "A."

GETZ BROS. & CO. OF THE ORIENT, LTD.

Incorporated.

Exporters

and

Importers.

Whiteaway, Laidlaw Bldg.,

Nanking Road Cor. Szechuen.

Shanghai, China, February 20th, 1922.

Mr. F. J. Schuhl,

112 Szechuen Road,

Shanghai.

Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately

40 *Getz Bros. & Co. of the Orient, Limited*

fifty (50) tons of Plate Cuttings that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept this offer.

Yours truly,

GETZ BROS. & CO. OF THE ORIENT, LTD.

By T. L. Parkhurst,
Manager.

TLP-RA

Cause No. 1676 Exhibit "A" U. S. Court for China. [30]

COPY.

Plaintiff's Exhibit "B."

February 16th, — 2.

Messrs. Getz Bros. & Co.,
Shanghai, China.

Dear Sirs:

Your letter of the 14th instant addressed to the Merchandise Brokerage Co. has been turned over to the writer for reply. I would like to have a definite answer from you as to whether or not you intend to deliver to my client 370 tons of steel plate cuttings under the terms of your contract dated February 3d. My client feels that they are entitled to the delivery of this plate.

Yours very truly,

Cause No. 1676 Exhibit "B" U. S. Court for China. [31]

COPY.

Plaintiff's Exhibit "C."

February 21st, — 2.

Messrs. Getz Bros. & Co. of the Orient, Ltd.,
Shanghai, China.

Dear Sirs:

Re: Merchandise Brokerage Co.

I have your kind favor of the 20th instant and beg to say that my clients are willing to accept the fifty tons of plate cuttings mentioned in your letter providing however you agree to deliver the balance of the cargo under the contract within 48 hours. My client feels that they are entitled to the entire lot 370 tons and unless the cargo is delivered, I will be compelled to institute proceedings for damages.

Yours very truly,

Cause No. 1676 Exhibit "C" U. S. Court for
China. [32]

COPY.

Plaintiff's Exhibit "D."

GETZ BROS. & CO. OF THE ORIENT, LTD.

Incorporated.

Exporters

and

Importers.

Whiteaway, Laidlaw Bldg.,

Nanking Road Cor. Szechuen.

Shanghai, China, February 14th, 1922.

The Merchandise Brokerage Co.,

No. 7 Ezra Road,

Shanghai.

Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS.

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

“Re Plate Cuttings stock—We understand legally must sue buyers before selling.”

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

GETZ BROS. & CO. OF THE ORIENT, LTD.

By T. L. Parkhurst,
Manager.

TLP/RA

enclos: cheque.

Cause No. 1676 Exhibit "D" U. S. Court for
China. [33]

(Defendant's Exhibit No. 1.)

No. 705 Shanghai, February 14, 1922.
November 17, 1922.

O. K.—T. L. P.

ASIA BANKING CORPORATION,
SHANGHAI BRANCH.

Pay Merchandise Brokerage Co., or order Shanghai Taels Nine Hundred only.

GETZ BROS. & CO. OF THE ORIENT, LTD.

p. p. By T. L. Parkhurst,
Manager.

Sh. Tls. 900.00.

[Endorsement on back of check]: MERCHANDISE BROKERAGE COMPANY. (Sgd.) By H. M. Shirek, Manager. [34]

In the United States Court for China.

Certificate of Reporter.

I, Ralph Thomas Peyton-Griffin, Official Reporter of the United States Court for China, do hereby certify that the above and foregoing transcript, pages 13 to 29, inclusive, and Exhibits "A" to "D," inclusive, and No. 1, pages 30 to 34, inclusive, contains all the testimony offered by either party at the trial of the above-entitled cause together with objections of counsel and rulings thereon by the Court.

R. T. PEYTON-GRIFFIN,
Official Reporter. [35]

After plaintiff had rested, as appears on page 24 of the foregoing transcript, defendant's counsel handed to the reporter, Judge and opposing counsel, but did not offer as an exhibit nor file with the Clerk, the following two typewritten manuscript pages, which he had prepared in advance: [36]

Mr. BRYAN.—If your Honor pleases, defendant moves that plaintiff's petition be dismissed and that the Court find for the defendant, notwithstanding the evidence, upon the following grounds:

1. Because plaintiff has not proved facts sufficient to constitute a cause of action.

2. Because the evidence does not sufficiently and satisfactorily establish that the plaintiff and the defendant ever entered into any contract on the 3d day of February, 1922, whereby the defendant

agreed to sell to the plaintiff and the plaintiff to purchase from the defendant three hundred and seventy (370) tons of Mild Steel Plate Cuttings.

3. Because the evidence sufficiently and satisfactorily establishes that the contract, if any, a copy of which is attached to the plaintiff's petition, contains the following clause:

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advices from our home office promise sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

4. Because the evidence sufficiently and satisfactorily establishes that on the 14th day of February, 1922, the defendant wrote the plaintiff the following letter:

“February 14th, 1922.

The Merchandise Brokerage Company,
No. 7 Ezra Road,
Shanghai.

Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS.

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

‘Re Plate Cuttings stock—We understand legally must sue buyers before selling.’

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer

to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the liability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our cheque No. 705 for [37] Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

RLP/RA

enclos: cheque."

5. Because the evidence sufficiently and satisfactorily establishes that the defendant received the check for Taels Nine Hundred (T900.00) made out to said plaintiff and signed by said defendant, which said check was enclosed in said letter dated February 14, 1922, being the return of deposit referred to in said contract, if any, attached to plaintiff's petition, and that plaintiff cashed said check for Taels Nine Hundred (T900.00).

6. Because the evidence sufficiently and satisfactorily establishes that no written confirmation of said contract, if any, was ever made.

7. Because said contract, if any, attached to plaintiff's petition provides:

"No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after buyers have been notified of the arrival of the goods in Shanghai * * * ."

8. Because the evidence sufficiently and satisfactorily establishes that plaintiff was notified at the time of the signing of said contract, if any, that said three hundred and seventy (370) tons of Mild Steel Plate Cuttings had arrived in Shanghai, and that said plaintiff, although he had been notified that said goods had arrived in Shanghai, made no claim within seven days thereafter in accordance with the provisions of said contract, if any.

9. Because plaintiff has failed to prove any legal damages.

Defendant further moves the Court to exclude from its consideration all of the evidence introduced on behalf of plaintiff, and requests the Court to find for the defendant, notwithstanding the evidence. [38]

Thereafter on the 14th day of June, 1923, the Honorable Charles S. Lobingier, Judge of the United States Court for China, filed with the Clerk of said court his decision overruling defendant's motion to dismiss the plaintiff's petition and rendering judgment in favor of the plaintiff and against the defendant for the sum of T6,000.00, together with interest from February 28, 1922, and costs. Said decision is as follows: [39]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK (Doing Business as MERCHAN-
DISE BROKERAGE COMPANY),

Plaintiff,

vs.

GETZ BROS. OF THE ORIENT, LTD.,
Defendant.

Judgment.

SYLLABUS.

(By the COURT.)

1. PLEADING.—A denial is nullified by a subsequent admission of the same fact.

2. ID.—“All defenses not made in the pleadings are considered waived.”

3. CONTRACTS.—An instrument reciting a sale and providing for “complete delivery and payment” but which also contains a separate and distinct provision for the delivery of unidentified documents under certain conditions, evidences a severable, and not an entire, contract.

4. ID.—The first provision of such a contract may be enforced altho the conditions relating to the second have not been performed.

5. Evidence reviewed and found insufficient to show such nonperformance.

6. PRESUMPTION.—Where material evidence available to a party is not produced, the presumption is that it would be adverse.

Messrs. SCHUHL & SCHOENFELD, by Mr. SCHUHL, for Plaintiff.

Messrs. DAVIES & BRYAN, by Mr. Bryan, for Defendant. [40]

LOBINGIER, J.—On February 3, 1922, defendant, by its manager, signed a document whose provisions, in so far as involved here, are as follows:

“GETZ BROS. & CO., OF THE ORIENT LTD., *have sold* and Merchandise Brokerage *have bought* the following described merchandise, upon the terms and conditions as made herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable. * * *

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922. * * *

Quantity	Description	Price U. S. Gold
370 Tons.	(More or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.	

Say Three hundred sixty to Three hundred seventy-one tons at Shanghai Taels 2.75 per picul of 133 $\frac{1}{3}$.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on

Quantity	Description	Price U. S. Gold
	payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made. * * *	

No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai.”

It is expressly admitted that none of these goods were ever delivered and it is undisputed (p. 3) that plaintiff was ready to make payment on the date fixed for delivery.

Defendant’s counsel in argument contends that the parties never reached the stage of a contract. His answer

“admits executing the document * * * mentioned * * * but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant’s home office as provided for in said document.”
(par. 2.) [41]

Now it is nowhere “provided in said document” that the same—i. e. the “contract of sale”—be “confirmed by defendant’s home office.” On the contrary the document recites the sale as already effected. “Getz Bros. & Co. *have sold* and Merchandise Brokerage *have bought*” etc. Surely such a transaction needed no confirmation. The docu-

ment recites an executed contract of sale, not an *offer* to sell. Had it been a mere offer defendant would hardly have accepted, and plaintiff would hardly have paid, \$900 of the price.

It is true that another portion of the document declares that "written confirmation *will* be made," (not that it must be); but the context indicates that it applies to something else than the contract of sale and if it were intended to apply to the latter it could have no effect upon a contract already executed. Since no other reason is alleged for impugning the contract we must regard the denial in paragraph 2 as insufficient.

That counsel himself so regarded it, seems indicated by the subsequent averment

"if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties." (par. 6.)

Not only is no proof of cancellation offered but the averment itself seems a qualified admission that there was a contract and, therefore, nullifies the denial.¹ Again the very clause invoked by defendant, and last above quoted speaks of the instrument sued upon as "this contract" while in its letter (Ex. D) of February 14, 1922, eleven days after the instrument was signed, defendant expresses

"regret that we cannot carry out *our contract* with you."

Almost a week later defendant wrote again "to

¹ Veasey vs. Humphreys, 27 Or. 515, 41 Pac. 8 (per Wolverton, J.); Derby vs. Gallup, 5 Minn. 119.

advise that we have been holding for the above (plaintiff) approximately fifty (50) tons of Plate Cuttings that were shipped for our stock." (Ex. A.) It is undisputed (p. 3) that this lot was a part of the [42] original cargo forming the subject matter of the sale which defendant not only does not question, but appears to recognize in this letter. Surely it would seem to be estopped from denying that there was a contract. Clearly also authorities are not in point which construe mere conditional offers.

II.

While only a part of it is pleaded and relied upon in the answer, counsel's main reliance in argument is upon the following provision of the instrument sued on:

"We agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be received approximate seven (7) days when written confirmation will be made."

It will be seen that this does not, in terms, qualify the provisions above discussed and which in the instrument are separated from it by considerable other matter. The clause in question does not, in other words, provide, or even hint, that the sale and delivery of, or payment for, the goods are conditioned upon the receipt of "cable advice from our Home Office." On the contrary "payment" is assumed as something already fixed and upon it is conditioned the delivery not of cargo—which had already been provided for absolutely—but of "docu-

ments.” What these were we are left to conjecture and no attempt was made to explain the ambiguity by evidence. If they were shipping papers they were clearly unnecessary for delivering the goods for these, it is undisputed (p. 3), had been landed in Shanghai before the contract was signed.

It is evident, then, that we are here considering an independent provision, separate and distinct from the portion which recites the sale as a *fait accompli* and provides for “complete delivery and full payment” respecting the goods. The instrument before us, in other words, evidences not an *entire* but a *severable* [43] contract²—i. e. it contains not only a memorandum of sale requiring “complete delivery and full payment” but also a distinct provision regarding unidentified documents. Now it is one of the characteristics of a *severable* contract that one portion of it may be enforced even tho there can be no recovery as to another and distinct portion.³ At most such would be the result of accepting counsel’s contention here. If it were true that the provision relied upon and last quoted has not been complied with, that would not prevent recovery for the breach of the separate and distinct

²Corpus Juris, XIII, 561. Cf. p. 562 for “illustrations of severable contracts” and Page, Contracts, III, sec. 1483 *et seq.* John Layton Co. vs. Blomberg, 1 Extrater., 827-830.

³Page, Contracts, III, sec. 1483; Katz vs. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A., 826; McGrath vs. Cannon, 55 Minn. 457, 57 N. W. 150; Burwell etc. Co. vs. Wilson, 57 Neb. 396, 77 N. W. 762; Hutchens vs. Sutherland, 22 Nev. 363, 40 Pac. 409.

agreement to deliver the goods which defendant had "sold," and plaintiff had "bought."

But we are unable to find that noncompliance with the provisions relied upon has been shown. Defendant offered no evidence in support of that contention and the letter (Ex. D.) of its manager seems quite unsatisfactory on that point. It does not mention any "cable advice" nor state whether "our home office permits sale without suit against original buyers." The letter merely states that "they * * * advise us to take legal proceedings" —against whom or for what purpose is nowhere suggested in the letter. And when we turn to the evidence, the omissions of the letter seem even more significant. For it is undisputed (p. 3) that defendant's manager, while claiming to have "received a cable from his home office" * * * "would not" show it and "was not willing to do so." Defendant's counsel stated in open court that the cable was in his office but neither was it produced nor was the manager called nor was his absence explained. The rule is that where a party fails to produce in support of his contention available evidence, it is presumed to be adverse. As was said by the Supreme Court⁴

⁴Kirby vs. Tallmadge, 160 U. S. 379, 40 L. ed. 463, quoting Starkie on Ev. I, 54. See also The New Yor, 175 U. S. 204, 44 L. ed. 126; Clifton vs. U. S., 4 How. 242, 11 L. ed. 957; The M. E. Luckenbach, 174 Fed. 265; The Luckenbach, 144 Fed. 980; The Georgetown, 135 Fed. 854; The Bombay, 46 Fed. 665; The Fred. M. Lawrence, 15 Fed. 635; The Freddie L. Porter, 8 Fed. 871.

“The conduct of the party in omitting to produce [44] that evidence in elucidation of the subject matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudices.”

Finally there is the undisputed fact (p. 3) that the manager did not “take legal proceedings against the original purchasers,” as he naturally would have done had such instructions been received from the home office. On the contrary the manager states in his letter (Ex. “D.”) that “the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.” Clearly we could not find from this evidence that “cable advice from the home office” did not “permit sale without suit against original buyers.” The inference to be drawn from the manager’s course of action seems quite the contrary for it is undisputed (p. 3) that he did sell “to a different party.”

The contention that plaintiff did not present its claim “within seven days after the buyers have been notified of the arrival of the goods in Shanghai” is not pleaded in the answer and “all defenses not made in the pleadings are considered waived.”⁵

It may be observed, however, that there is a total lack of evidence that plaintiff was ever “notified of the *arrival* of the goods in Shanghai.” He knew,

⁵Cyc. XXI, 128.

indeed, that they were here when the contract was signed but as to their *arrival* nothing is said. Besides knowledge is not the same as notice “for knowledge may exist within notice and there may be notice without any actual knowledge.”⁶ In order to invoke the clause, defendant must show that it “notified (plaintiff) of the arrival of the goods”—which it seems never to have done. The clause is a highly technical one and must be invoked most strongly against its originator. Indeed it is doubtful if the contract was even [45] signed within seven days of the arrival of the goods, and if not, compliance with counsel’s construction of it would have been impossible.⁷

We must find, therefore, that defendant committed a breach of its contract to deliver these goods and the evidence renders it easy to assess plaintiff’s damages. His testimony (p. 5) is undisputed that he suffered a loss of Tls. 6,000., that “the purchase price under the contract was Tls. 2.75 per picul. There was approximately six thousand piculs and the market price was approximately Tls. 1.00 higher and I could have sold for Tls. 3.75.” Not only is this undisputed but it is corroborated by two other witnesses (pp. 10, 11) dealing in the goods forming the subject matter of the sale. Defendant produced no competent evidence as to value and we must, therefore, overrule defendant’s motion to dismiss and find that the difference between the contract price and the market price at

⁶Bishham, *Equity* (7th ed.), 397.

⁷See Anson, *Contracts* (Huffcutt’s ed.) sec. 410.

the time and place of delivery⁸ was six thousand (6000) taels, for which sum with interest thereon from February 28, 1922, the agreed date of delivery, together with costs, judgment is accordingly rendered in favor of plaintiff and against defendant.

By the Court.

CHARLES S. LOBINGIER,
Judge. [46]

Judgment. Filed June 14, 1923. W. A. Chapman, Clerk.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Exception to Order Overruling Motion to Dismiss
Petition.**

Comes now the defendant through its attorneys, Messrs. Davies & Bryan, and excepts to the order of the Court filed on June 14, 1923, overruling defendant's motion to dismiss plaintiff's petition.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

⁸Cyc. XXXV, 633.

Exception. Filed at Shanghai, China, this 15 day of June, 1923. (Sgd.) W. A. Chapman, Clerk.
[47]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Notice of Appeal.

Comes now the defendant through its Attorneys, Messrs. Davies & Bryan, and hereby excepts to the judgment of the Court filed at Shanghai, China, on the 14th day of June, 1923, and said defendant hereby gives notice of intention to appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

Notice of Appeal. Filed at Shanghai, China, this 15th day of June, 1923. (Sgd.) W. A. Chapman, Clerk.

And thereafter on the 15th day of June, 1923, the defendant filed with the Clerk of the United States Court for China a formal exception in writing to

said decision of the Court overruling defendant's motion made at the conclusion of plaintiff's case to dismiss plaintiff's petition, which said defendant hereby designates as its

EXCEPTION No. 5.

And on said 15th day of June, 1923, defendant filed a written exception to said decision of the Court rendering judgment against said defendant in the sum of Taels Six Thousand (T6,000.00), together with interest from February 28, 1922, and costs, which said defendant hereby designates as its

EXCEPTION No. 6.

and simultaneously filed with the Clerk of said Court on June 15, 1923, a notice of appeal. [48]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Notice of Motion.

Please take notice that Getz Bros. & Company of the Orient, Ltd., the defendant herein, through its attorneys, Messrs. Davies & Bryan, will call up

for hearing on Monday, June 25, at 3 P. M., in the Courtroom of the United States Court for China defendant's petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and at the same time will request the Honorable Charles S. Lobingier, Judge of the United States Court for China, (1) To allow, settle and seal defendant's bill of exceptions; (2) To sign the order allowing defendant's writ of error; (3) To sign the citation on writ of error requiring plaintiff to appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit within a specified number of days; (4) To sign an order extending the time within which to file the record and docket the case in the United States Circuit Court of Appeals for the Ninth Judicial Circuit; and (5) To fix and approve the amount of defendant's supersedeas bond.

DAVIES & BRYAN,
Attorneys for Defendant.

Notice of motion received this the 23d day of June at 10:00 A. M. o'clock.

(Sgd.) SCHUHL & SCHOENFELD,
Attorneys for Plaintiff.

Notice of Motion. Filed at Shanghai, China, this 23d day of June, 1923. W. A. Chapman, Clerk.
[49]

Order Allowing and Settling Bill of Exceptions.

Now, on the seventh day of July, 1923, two days after the filing by defendant of its second and final copy of "assignment of errors," this cause comes on for hearing upon the defendant's motion of June 23, 1923.

Upon consideration whereof the foregoing bill of exceptions, consisting of pages 6 to 49, inclusive, is hereby allowed, settled and incorporated in the record herein.

CHARLES S. LOBINGIER,
Judge, United States Court for China. [50]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and style of THE MERCHANDISE BROKER-
AGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action, being the plaintiff in error herein, and in connection with its petition for writ of error makes the following assignment of errors, which it avers

occurred in the trial and decision of this cause in said Court, to wit:

1. That the United States Court for China erred in overruling defendant's demurrer to plaintiff's petition by its order filed with the Clerk of said Court on April 19, 1923.

BEING EXCEPTION No. 1.

2. That the said United States Court for China erred in overruling defendant's demurrer to plaintiff's petition by its order filed with the Clerk of said Court on April 19, 1923, for the following reasons:

(a) Because plaintiff's petition states no cause of action against defendant.

(b) Because the contract relied upon by the plaintiff, a portion of which is quoted in said order overruling defendant's demurrer was made upon certain express terms and conditions, two of which are, (1) The receipt of cable advice from defendant's home office permitting sale without suit against original buyer; and (2) That written confirmation will be made.

(c) Because plaintiff's petition contains no paragraph alleging, (1) That defendant was in receipt of cable advice from its home office permitting sale without suit against original buyers; and (2) That written confirmation had been made. [51]

3. That said United States Court for China erred in holding in its order filed with the Clerk of said Court on the 19th day of April, 1923, over-

ruling defendant's demurrer to plaintiff's petition that,

“A sale of merchandise with an undertaking for complete delivery by a certain date from Shanghai stock is not rendered conditional by a further clause requiring delivery of shipping documents on payment if cable advices from home office permits.”

because neither plaintiff's petition nor the contract, if any, relied upon by plaintiff and attached to his petition contain the words “shipping documents.”

4. That said United States Court for China erred in its order overruling defendant's demurrer to plaintiff's petition filed with the Clerk of said Court on April 19, 1923, in distinguishing the case of

Hsieh Po-Hsiang vs. Shippers Commercial Corp., I Extraterritorial Cases, p. 1010.

5. That said Court erred in overruling defendant's motion made at the conclusion of plaintiff's case to dismiss plaintiff's petition, notwithstanding the evidence,

BEING EXCEPTION No. 2.

6. That said United States Court for China erred in sustaining plaintiff's application to strike out testimony on the ground of hearsay,

BEING EXCEPTION No. 3.

7. That said United States Court for China erred in sustaining plaintiff's objection to the following question:

“What was the market price of mild steel plate cuttings from inquiries which you made yesterday?”

BEING EXCEPTION No. 4.

8. That said United States Court for China erred in failing to rule upon defendant's motion made at the conclusion of plaintiff's case to exclude from its consideration all of the evidence introduced on behalf of plaintiff.

9. That said United States Court for China erred in [52] failing to rule upon defendant's request made at the conclusion of plaintiff's case to find for the defendant, notwithstanding the evidence.

10. That said United States Court for China erred in overruling defendant's motion to dismiss the petition made at the conclusion of plaintiff's case,

BEING EXCEPTION No. 5.

11. That said United States Court for China erred in rendering judgment against the defendant and in favor of the plaintiff for the sum of Taels Six Thousand (T6,000.00), together with interest thereon from February 28, 1922, and costs,

BEING EXCEPTION No. 6.

12. That said United States Court for China erred in not holding in its written decision filed with the Clerk of said Court on the 14th day of June 1923, according to the express terms of the contract, if any, relied upon by plaintiff, that the following were a part of the terms and conditions thereof:

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

13. That said United States Court for China erred in holding that paragraph 6 of defendant's answer was a qualified admission that there was a contract, and therefore nullified the denial made in paragraph two of said answer.

14. That said United States Court for China erred in holding that paragraph 6 of defendant's answer was a qualified admission that there was a contract, and therefore nullified the denial made in paragraph two of said answer, for the following reasons:

(a) Because plaintiff's counsel failed to make any motion, request or other application for judgment on the pleadings, as the record will show.

(b) Because the question of the qualified admission of the contract by paragraph 6 of defendant's answer was raised by the Court without any request, [53] motion or other application made by plaintiff, as the record will show.

(c) Because plaintiff waived the qualified admission, if any, contained in paragraph six of defendant's answer by failing to make any motion, request or application for judgment on the pleadings prior to the rendition of the Court's decision filed with the Clerk of said Court on June 14, 1923.

(d) Because even if paragraph 6 of defendant's answer was a qualified admission that there was a contract it was also an allegation that the contract had been cancelled.

(e) Because the pleadings presented a material issue.

(f) Because the answer states sufficient facts to constitute a defense to the action.

(g) Because paragraph 6 of defendant's answer states facts sufficient to constitute a defense to the action.

(h) Because defendant's answer contained denials of material allegations in plaintiff's complaint.

(i) Because the facts admitted on the pleadings do not show that the plaintiff would be entitled to judgment.

(j) Because where a party moves for judgment on a pleading the allegations of his adversary's pleadings are to be accepted as true for the purposes of a motion.

(k) Because where a party moves for judgment on the pleadings he not only for the purposes of his motion admits the truth of the allegation of his adversary, but admits the untruth of all his own allegations which have been denied by his adversary.

(l) Because the court went outside of the pleadings in determining that paragraph 6 of defendant's answer was a qualified admission of a contract.

15. That said United States Court for China erred in holding in its written decision filed with

the Clerk of said Court on the 14th day of June, 1923, that the following provision contained in the contract, if any, relied upon by plaintiff, which is quoted in the Court's decision.

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

was severable and divisible from the balance of said contract, if any. [54]

16. That said United States Court for China erred in holding in its written decision filed with the Clerk of said Court on the 14th day of June, 1923, that the following provision contained in the contract, if any, relied upon by plaintiff, which is quoted in the Court's decision,

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

was severable and divisible from the balance of said contract, if any, for the following reasons:

(a) That the portion above quoted of said contract, if any, is not severable from the balance of said contract as a matter of law.

(b) Because said contract, if any, relied upon by plaintiff contains the following clause: "Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, UPON THE TERMS AND CONDITIONS AS MADE HEREIN AND ON THE REVERSE SIDE OF THIS CONTRACT."

(c) Because the portion above quoted of said contract, if any, was just as much a term and condition thereof as any other clause thereof.

(d) Because said contract, if any, was made for the purchase of one quantity of goods for one consideration.

17. That said United States Court for China erred in holding that defendant had waived the right (by failure to plead it) to rely upon the following clause in the contract, if any, relied upon by plaintiff:

"No claim in respect of the goods or under this contract shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai."

18. That said United States Court for China erred in holding that there was a total lack of evidence that plaintiff was ever notified of the arrival of the goods in Shanghai.

19. That said United States Court for China erred in holding that no proof was offered of cancellation of the contract, [55] if any, relied upon by plaintiff.

20. That said United States Court for China erred in holding,

“An instrument reciting a sale and providing for ‘complete delivery and payment’ but which also contains a separate and distinct provision for the delivery of unidentified documents under certain conditions, evidences a severable, and not an entire, contract.”

and that

“The first provision of such a contract may be enforced although the conditions relating to the second have not been performed.”

for the following reasons:

(a) Because the contract contains no separate and distinct provision as to the delivery of unidentified documents.

(b) Because the plaintiff in its petition relied upon the contract as a whole and did not plead that it was severable and divisible.

(c) Because plaintiff failed to raise at the trial, as the record will show, the question of the severability of said contract, if any, relied upon.

21. That said United States Court for China erred in applying the principle that where material evidence available to a party is not produced the presumption is that it would be adverse.

22. That said United States Court for China erred in applying the principle that where material evidence available to a party is not produced the presumption is that it would be adverse, for the following reasons:

(a) Because said Court failed to rule upon defendant's motion to dismiss plaintiff's petition until it rendered final judgment.

(b) Because the principle that where material evidence available to a party is not produced the presumption that it would be adverse cannot be applied in making a ruling on a motion to dismiss plaintiff's petition.

23. That said United States Court for China erred in holding in its written decision filed with the Clerk of said Court [56] on the 14th day of June, 1923, that all defenses not made in the pleadings are considered waived.

24. That said United States Court for China in reviewing the evidence erred in finding it insufficient to show nonperformance on the part of the plaintiff.

25. That said United States Court for China erred in holding that the amount of damages was undisputed and corroborated by two other witnesses dealing in the goods forming the subject matter of the sale.

26. That said United States Court for China erred in holding that defendant had failed to produce any competent evidence as to value.

27. That said United States Court for China erred in not holding that the evidence was insufficient considered in any light to render judgment in favor of the plaintiff and against the defendant.

28. That said United States Court for China erred in failing to rule upon defendant's motion and request made at the conclusion of the case to

exclude from its consideration all the evidence introduced by plaintiff and to give judgment for the defendant, notwithstanding the evidence.

29. That said United States Court for China erred in not rendering judgment in favor of the defendant and against the plaintiff.

WHEREFORE, defendant prays that said judgment be reversed and that the defendant be allowed to depart hence and recover its costs.

DAVIES & BRYAN,
Attorneys for Defendant.

Assignment of Errors. Filed at Shanghai, China, this 5th day of July, 1923. W. A. Chapman, Clerk.
[57]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT LTD.,
Defendant.

Petition for Writ of Error.

To the Honorable, the United States Court for
China:

Getz Bros. & Co. of the Orient, Ltd., the defendant in the above-entitled action, feeling itself aggrieved by the judgment of the Court entered in

favor of the plaintiff in said cause on the 14th day of June, 1923, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of Taels Six Thousand (T6,000.00), Shanghai Sycee, together with interest thereon from February 28, 1922, and costs, taxed at the sum of Mex. \$71.06, comes now by Davies & Bryan, its attorneys, and petitions said Court for an order allowing it to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and in this behalf alleges that in said judgment and in the proceedings had prior thereto in said action certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the assignment of errors which is filed with the petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings [58] and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order may be made by this Court fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: Shanghai, June 23d, 1923.

GETZ BROS. & CO. OF THE ORIENT,
LTD., a Corporation,
By DAVIES & BRYAN,
Its Attorneys.

Petition for Writ of Error. Filed at Shanghai,
China, this 23d day of June, 1923. W. A. Chap-
man, Clerk. [59]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Order Allowing Writ of Error.

This 7th day of July, 1923, came the defendant,
by its attorneys Messrs. Davies & Bryan, and filed
herein and presented to the Court its petition for
the allowance of a writ of error, an assignment of
errors intended to be urged by it, praying also that
a transcript of the record and proceedings and
papers upon which the judgment herein was ren-
dered, duly authenticated, may be sent to the United
States Circuit Court of Appeals for the Ninth Ju-
dicial Circuit, and that such other and further

proceedings may be had as may be proper in the premises.

On consideration whereof, IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendant upon said writ of error be and the same is hereby fixed at the sums of Shanghai Taels Six Thousand (Sh. T6,000.00), being principal, Shanghai Taels Nine Hundred and Thirty (Sh. T930.00), being interest, and Mexican Dollars Eighty-five and 86/100 (Mex. \$85.86), being costs, together with interest on said sums from June 14, 1923, to time of payment, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded [60] pending the determination of such writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: Shanghai, July 7, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Order Allowing Writ of Error. Filed at Shanghai, China, this 7th day of July, 1923. W. A. Chapman. [61]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT LTD.,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Getz Bros. & Co. of the Orient, Ltd., a corpora-
tion, as principal, and Asia Banking Corporation,
as surety, are jointly and severally held and firmly
bound unto the plaintiff in the above-entitled action
in the sums of Taels Six Thousand (T6,000.00),
Shanghai Sycee, being principal, Taels Nine Hun-
dred and Thirty (T930.00,) Shanghai Sycee, being
interest, and Mexican dollars Eighty-five and
86/100 (Mex. \$85.86), being costs, together with in-
terest on said sums from June 14, 1923, to time of
payment, to which payment well and truly to be
made we bind ourselves and each of us jointly and
severally, and each of our successors, representa-
tives and assigns, firmly by these presents.

SIGNED with our seals and dated this 29th day
of June, 1923.

WHEREAS, the above-named defendant is about
to sue out a Writ of Error to the United States
Court of Appeals in and for the Ninth Circuit to

•

reverse the judgment heretofore rendered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, and awarding judgment in favor of the plaintiff therein for the sum of Tael Six Thousand (T6,000.00), Shanghai Sycee, together with interest thereon from February 28, 1922, [62] which amounts to Tael Nine Hundred and Thirty (T930.00), Shanghai Sycee, and costs in the sum of Mexican Dollars Eighty-five and 86/100 (Mex. \$85.86).

NOW, THEREFORE, the conditions of this obligation are such that if the above-named defendant shall prosecute such writ of error to effect and shall answer all damages, costs and interest if it shall fail to make good its plea then this obligation shall be void, otherwise to remain in full force and effect.

GETZ BROS. & CO. OF THE ORIENT,
LTD.,

By T. L. Parkhurst,
Manager.

Witness:

W. A. CHAPMAN.

ASIA BANKING CORPORATION,

By M. C. Cooke.

We agree to the above and foregoing bond.

SCHUHL & SCHOENFELD,

By F. J. Schuhl,

Attorneys for Plaintiff.

The foregoing bond is hereby approved this 5th day of July, 1923.

CHARLES S. LOBINGIER,
Judge of the United States Court for China.

Bond on Writ of Error. Filed at Shanghai, China, this 5th day of July, 1923. W. A. Chapman, Clerk. [63]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Praeipie for Transcript of Record.

To the Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

Petition. Filed March 28, 1922.

Defendant's demurrer. Filed April 10, 1922.

Defendant's exception to order overruling demurrer. Filed April 21, 1923.

Defendant's answer. Filed April 26, 1923.

Defendant's motion to dismiss plaintiff's petition.

Filed in open court on June 12, 1923.

Defendant's exception to order overruling defendant's motion to dismiss the petition. Filed April 15, 1923.

Defendant's exception to the judgment of the Court rendered on April 14, 1923, and notice of appeal. Filed April 15, 1923.

Plaintiff's Exhibits "A," "B," "C" and "D" and Defendant's Exhibit "1."

Bond on writ of error. Filed July 5, 1923. [64]

Petition for writ of error.

Bill of exceptions, filed July 7th, including order of Court overruling defendant's demurrer, filed April 19, 1923, and the decision of the Court filed on June 14, 1923.

Defendant's assignment of error. Filed July 5, 1923.

Writ of error.

Citation on writ of error.

Order allowing writ of error.

Praeceptum for transcript.

Order extending time to file record in Circuit Court of Appeals.

Clerk's certificate of record.

Notice of motion to allow bill of exceptions and writ of error. Filed June 23, 1923.

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

DAVIES & BRYAN,
Attorneys for Defendant.

Praeceptum for Transcript of Record. Filed at Shanghai, China, this 23d day of June, 1923. W. A. Chapman, Clerk. [65]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America:

To the Honorable Judge of the United States
Court for China, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said United States Court for China, before you, between H. M. Shirek, doing business under the name and style of the Merchandise Brokerage Co., plaintiff, and Getz Bros. & Co. of the Orient, Ltd., defendant, a manifest error hath happened, to the great damage of the said Getz Bros. & Co. of the Orient, Ltd., defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, on the day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according [66] to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM H. TAFT,
Chief Justice of the United States, this 7th day of
July, 1923.

CHARLES S. LOBINGIER,
Judge of the United States Court for China.
Attested:

W. A. CHAPMAN,
Clerk of the United States Court for China.
Writ of Error. Filed at Shanghai, China, this
7th day of July, 1923. W. A. Chapman, Clerk.
[67]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Order Extending Time to August 31, 1923, to File
Record and Docket Cause.**

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error sued out, is extended until the 31st day of August, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Order Extending Time to August 31, 1923, to File Record and Docket Cause. Filed at Shanghai, China, this 9th day of July, 1923. W. A. Chapman, Clerk. [68]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

To H. M. Shirek, doing business under the name
and style of the Merchandise Brokerage Co.,
GREETING:

You are hereby cited and admonished to be and

appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held at the City of San Francisco within 55 days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States Court for China, wherein Getz Bros. & Co. of the Orient is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Lobingier, Judge of the United States Court for China, this 7th day of July, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

We hereby, this 21st day of July, 1923, accept due personal service of this citation on behalf of H. M. Shirek, doing business under the name and style of The Merchandise Brokerage Co.

SCHUHL & SCHOENFELD,

Attorneys for Defendant in Error.

Citation on Writ of Error. Filed at Shanghai, China, this 7th day of July, 1923. W. A. Chapman, Clerk. [69]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Certificate of Clerk United States Court for China
to Transcript of Record.**

Shanghai, China,—ss.

In pursuance of the command of the writ of error within, I, William A. Chapman, Clerk of the United States Court for China, herewith transmit a true copy of the record, bill of exceptions, assignments of error and all proceedings in this case of H. M. Shirek, doing business under the name and style of The Merchandise Brokerage Co., the plaintiff, vs. Getz Bros. & Co. of the Orient, Ltd., the defendant, lately pending in the United States Court for China, under my hand and the seal of said Court.

Witness my official signature and the seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said Court this 10th day of July, 1923.

[Seal]

W. A. CHAPMAN,

Clerk of the United States Court for China.

Certificate of Clerk, United States Court for China to Transcript of Record. Filed at Shanghai, China, this 10th day of July, 1923. W. A. Chapman, Clerk. [70]

[Endorsed]: No. 4079. United States Circuit Court of Appeals for the Ninth Circuit. Getz Bros. & Co. of the Orient, Limited, Plaintiff in Error, vs. H. M. Shirek, Doing Business Under the Name and Style of The Merchandise Brokerage Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China. Filed August 18, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.